UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FOOD SERVICES OF AMERICA, INC.,
a subsidiary of SERVICES GROUP
OF AMERICA, INC.

and **Case No. 28-CA-63052**

PAUL LOUIS CARRINGTON, An Individual

Johannes Lauterborn, Esq., Counsel for the General Counsel.
Richard Walker, Esq., Walker & Peskind, PLLC, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on January 24 through 27, 2012 in Phoenix, Arizona. The Complaint herein, which issued on October 31, 2011[1] and was based upon an unfair labor practice charge filed on August 22 by Paul Louis Carrington, alleges that the Respondent has maintained overly broad and discriminatory rules of confidentiality and non-disclosure that its employees are required to sign and which are also contained in its Employee Handbook. The Complaint further alleges that Respondent, by Scott Bixby, its senior vice president, interrogated its employees about their concerted activities, orally promulgated an overly broad and discriminatory rule prohibiting its employees from talking to other employees, threatened its employees with unspecified reprisals if they engaged in concerted activities, and created an impression among its employees that their concerted activities were under surveillance by the Respondent. At the conclusion of his case, Counsel for the General Counsel moved to amend the Complaint to also allege that Respondent violated Section 8(a)(1) of the Act by promulgating overly broad rules prohibiting employees from giving personal references and prohibiting employees from disclosing personal telephone numbers. Finally, the Complaint alleges that the Respondent further violated Section 8(a)(1) of the Act by discharging Carrington (on March 7) and Elba Rubio (on March 4) because they engaged in, or because Respondent believed that they engaged in, protected concerted activities.

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Facts and Analysis

A. Confidentiality and Non-Disclosure Allegations

Upon beginning employment with the Respondent, employees must sign its Confidentiality and Nondisclosure Agreement, which states, *inter alia*:

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2011.

As a condition of Services Group of America granting you access to its confidential information, the value of which you hereby acknowledge and in addition to any other confidentiality agreements and obligations that govern your conduct, you agree to the following requirements regarding your access to the Company's confidential information:

"Confidential information" means any and all information, whenever accessed or received, related to Company or any affiliate, including but not limited to, information relating to: financial matters, business plans, strategies, customers, marketing, product or service promotions, purchasing, vendors, discounts, rebates, earned marketing income ("EMI"), EMI tracking methods, payroll or employee information (other than payroll or employee information about Associate), business techniques, business tools· (including, without limitation, Company's B/I, EIS, payroll and infinium systems), analysis, contractual terms, costs, margins, ownership structure, financings or other information. Confidential Information does not include information that is generally available to the public through no improper action or inaction or breach of Associate.

Confidentiality; Ownership. Associate understands that Company and its affiliates value highly their Confidential Information, which they have developed at substantial cost and effort, and which are important Company and affiliate assets. Associate agrees that he or she will strictly maintain the confidentiality and proprietary nature of any and all Confidential Information. Associate agrees not to use or disclose any Confidential Information, directly or indirectly, except in furtherance of the Company's business or as consented to in writing in each instance by a Company officer, or, upon reasonable prior notice to Company, as required by law. Associate agrees not to access, read, forward, remove from Company premises, copy, or otherwise obtain or retain any Confidential Information except as necessary to perform his or her Job with the Company. This Agreement applies to Confidential Information in any form or format, including without limitation oral, visual, written, computer records, photographs and tape recordings, and applies to Confidential Information accessed by Associate before, as well as after, entering into this Agreement. This Agreement shall apply throughout Associate's employment with Company and after the termination of such employment at any time and for any reason (with or without cause) by Company or Associate. Associate acknowledges that Company and its affiliates are the sole owners of the Confidential Information.

Associate disclaims any right, title or interest in or to the Confidential Information, including without limitation any Confidential Information developed by Associate. Upon termination of employment (for any reason) Associate agrees to return to the Company all documents, discs or other items containing Confidential Information.

Remedies. Associate agrees that Company shall be entitled to preliminary and permanent injunctive relief, specific performance and other equitable relief, without the necessity of posting any bond or other security, in aid of litigation, or arbitration, if any arbitration agreement is applicable, to prevent any violation or threatened violation of this Agreement, in addition to any and all other legal or equitable remedies that may be

available to Company. The protections afforded by this Agreement are intended to be and shall be in addition to any and all other protections afforded by law, equity, or agreement.

In addition, Respondent's Employee Handbook, distributed to all new employees, contains the following rules, also alleged to be overly restrictive, and to violate Section 8(a)(1) of the Act:

SGA GUIDING PRINCIPLES

* * * *

Outside of our company, we remain quiet and safeguard our proprietary knowledge.

* * * *

COMPENSATION

The Company views your salary as a confidential matter and encourages you to discuss questions or concerns only with your Department Manager or Branch President.

CONFIDENTIALITY

We are a privately-held company. While many of our competitors are free with disclosing their proprietary information, we have a very strict policy in that regard. No one outside the Company needs to know anything about our Company unless the Chairman or President has identified a specific benefit to the Company. This includes the press and news media in general and trade journals and industry groups in particular. The latter includes vendors, trade associations and competitors wherever we meet them (trade shows, seminars, conventions or other social/business functions). "Disinterested" third parties you meet at non-industry business functions or purely social occasions also do not need to know anything about our Company. Unauthorized disclosure of information about our Company, no matter how harmless it may seem, can be grounds for discipline up to an including termination.

SOLICITATION

* * * *

Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

There is a very thin line between what information an employer may lawfully restrict employees from sharing or transmitting, and when such restrictions unlawfully hinder employees' Section 7 rights. Many recent Board cases are helpful in making this determination, but it remains a difficult one. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights,

the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the Board was more specific:

> Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The agreement executed by employees beginning their employment with the Respondent defines "confidential information" as "any and all information…including but not limited to, information relating to…payroll or employee information (other than payroll or employee information about Associate)…" The agreement states further: "Associate agrees that he or she will strictly maintain the confidentiality and proprietary nature of any and all Confidential Information" and "Associate agrees not to access, read, forward, remove from Company premises, copy or otherwise obtain or retain any Confidential Information except as necessary to perform his or her job with the Company." This rules excepts from the confidentiality definition payroll " information about Associate," in other words payroll information about the employee himself or herself; a reasonable reading of this provision is that each employee could discuss his/her terms and conditions of employment with fellow employees, or anybody else, without fear of discipline. However, the discussions of terms and conditions of employment requires the participation of two or more employees. If one of those employees refuses to permit the other employees to discuss his terms and conditions of employment, pursuant to the Respondent's rule, the discussion would be unduly restricted, or foreclosed entirely, thereby limiting the employees' protected concerted activities. I therefore find that this restriction violates Section 8(a)(1) of the Act as alleged in Paragraph 4(a) of the Complaint. *Labinal, Inc.*, 340 NLRB 203, 210 (2003).

The Employee Handbook contains three statements regarding confidentiality. "SGA Guiding Principal" at page 4, states: "Outside of our company, we remain quiet and safeguard our proprietary knowledge," while under "Compensation" at page 10, the Handbook states: "The Company views your salary as a confidential matter and encourages you to discuss questions or concerns only with your Department Manager or Branch President." [emphasis supplied] Finally, under "confidentiality" the Handbook states at page 18: "No one outside the Company needs to know anything about our Company unless the Chairman or President has identified a specific benefit to the Company." Although the compensation provision set forth above only "encourages" employees to discuss their salaries with the Department Manager or Branch President, rather than stating that discussions of salary with others are grounds for discipline, that sentence cannot be read in a vacuum. It says that the Respondent views salaries as a confidential manner and should only be discussed with the Department Manager or Branch President, with "only" underlined, and the confidentiality provision states that nobody outside the company needs to know anything about the Respondent's operation, and that unauthorized disclosure of information about the company can be grounds for discipline. I find that an employee reading these provisions together would reasonably feel that that his/her Section 7 rights are being restricted. I therefore find that these provisions in the Employee Handbook violate Section 8(a)(1) of the Act.

Finally, under "Solicitation," at page 24, the Employee Handbook states:

> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

In *Barney's Club*, 227 NLRB 414, 416 (1976), the administrative law judge stated:

> The right of employees to self-organization has often come into conflict with the right of employers to maintain discipline in their establishments and to control the use of their property. Over the years, the Board and the courts have attempted to reconcile these conflicts through the formulation of rules of law which attempt to maximize the scope of the rights of each to the extent that they do not unduly diminish the rights of the other…In attempting to reconcile the legitimate interests of both employers and unions, the Board has looked at the nature of the business. Thus, the rules which have evolved relating to industrial establishments have not been applied to retail stores. [citations omitted]

In the instant situation, limiting solicitation to non-working hours is clearly lawful, especially since the rule specifies that meal or break periods are not included in working hours. *Our Way, Inc.* 268 NLRB 394 (1983). As the rule also limits solicitations to non-working areas, the issue is whether this limitation is lawful. As it properly restricts solicitations to the time that employees are working, and in working areas, while allowing other solicitation, I find that this provision is lawful, and I therefore recommend that this allegation be dismissed. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962); *Golub Corporation*, 338 NLRB 515 (2002).

B. Discharges of Rubio and Carrington and Related Section 8(a)(1) Allegations

Admittedly, the Respondent discharged Rubio on March 4 and Carrington on March 7. The Complaint alleges that the Respondent discharged them because they engaged in, or because the Respondent believed that they engaged in, protected concerted activities (allegedly discussing the Respondent's national origin and religious discrimination against its employees, favoritism toward certain employees, insufficient training of employees and other issues), and that it discharged Carrington because he violated Respondent's rules involving confidentiality and non-disclosure set forth above in Section A, and to discourage other employees from engaging in these and other concerted activities. Respondent defends that Rubio was discharged solely for harassing fellow employee Michelle Aparicio by falsely and maliciously telling her that the Respondent was not happy with her work and planned to fire her. Respondent defends that Carrington was fired three days later for coming into the office on Saturday, March 5, a day that he was not scheduled to work, accessing Respondent's email system, and transmitting over three hundred emails, many of which contained Respondent's confidential trade secret and proprietary information, to Rubio's personal email address, and to his as well.

Respondent is a food service distributor operating from the State of Minnesota west to Northern California and Alaska, selling everything from food to paper products and cleaning supplies. It sells to institutions such as schools, universities, institutional food service providers, and prisons, as well as cruise lines and independently owned small food stores, but not to large grocery stores. In making these sales, the Respondent employs approximately four hundred fifty sales representatives who visit these customers regularly, and negotiate the products' price with each of these customers. Further, the Respondent purchases these products from thousands of different supplier (also called vendors), storing these products in its warehouses until they are

sold, and delivered to the customers.

Rubio began her employment with the Respondent in May 2008 as a supplier information specialist. Three months later she applied for and obtained a position of transportation analyst for Gampac and worked there until June 2010, when she returned to the Respondent in the position of supplier e commerce specialist. Her supervisor during the entire period of her employment with the Respondent was Merissa Hamilton. Carrington began his employment with the Respondent in September 2008 as a supplier information specialist. He was laid off in August 2009 as part of a reduction in force by the Respondent and was rehired in November 2009 in the same position, the only laid off employee who was rehired at that time. His supervisor during the entire period of his employment with the Respondent was also Hamilton.

The alleged protected concerted activity involving Rubio involved some unwanted religious interaction between Hamilton and Rubio, who is an agnostic, that was initiated by Hamilton. Rubio and Hamilton had been friends for some time, but this friendship ended when Hamilton began proselytizing regarding her religious convictions. There were a series of emails, initiated by Hamilton on November 7, 2010. The principal one from Hamilton to Rubio, states, *inter alia*:

> You need to listen more and stop assuming. I never said I was mad at you. I am a Christian which means that I don't hold hate or anger in my heart when someone does me wrong. I know you think being a Christian means something else, but again that would be an incorrect assumption…You seem to be offended by me…you get upset at decisions I make at work…My sister…asked if you were on drugs. My mother was also really concerned about your behavior.
>
> I love you Elba and I want all your dreams to come true. I see so much greatness in you, but lately you constantly seem lost. As a friend I don't know what to do because you seem to just keep pushing me away, constantly fighting me.
>
> You might not agree with my beliefs, but I know what my Father has done in my life and my husbands life. I know how he has changed me after I received him. ..My blessings come from my repentance and acceptance of Christ. I don't think someone can stop being lost or accomplish their dreams in complete fullness without him. The fact that every time I mention him you get offensive, turned off and push away tells me you know he's calling you, but your flesh refuses. He has so many great things planned for your life. He wants you to live in victory and stop being so upset all the time. He wants you to have peace and be happy. He loves you. For all this to occur you have to receive him.
>
> You can completely disagree. You can hate me. You can keep pushing me away…

Rubio responded later that day, *inter alia*:

> I have never been on drugs, did you ever care to think that maybe I'm distressed because of my personal life and problems with my family I can't control?...I don't disagree with your decisions at work…I'm not a religious person and I don't think the fact that you have accepted Jesus in your life means I need to follow suit. As long as I get the work done and the project finished I think that should be your major concern, not if I accepted Jesus into my life as my savior…

Hamilton responded, *inter alia*:

> There you go again being offended. I didn't say you were on drugs. I didn't think you were on drugs. My family and friends asked if you were on drugs based on their observations of you….
>
> I am concerned about your well being and happiness because I am your friend. I care about you as a friend way before an employee. You haven't been happy for most of the time I've known you. I didn't say you had to accept Christ. I offered it as a suggestion because of my satisfaction in life. Just like you make recommendations on things to me that you like. Well, you said a few months ago you were dissatisfied. I wouldn't be a friend if I kept my faith a secret.
>
> As your boss, I have been concerned because Jeff [presumably, Jeff Chester, Respondent's Director of Quality Assurance] asked if you were ok and seemed out of it for the last couple of months. Your personal life greatly impacts your work. I have had the same challenge. Becoming a stronger person emotionally and not being lost in life will do wonders for your career. You won't be stuck if you fix these things. You will be highly promotable…
>
> You don't have to stay my friend. It's up to you. But I am not going to stay in a friendship with you being offended by me every other day or so. That's not a healthy friendship. Sometimes people grow apart and that's ok…
>
> If you just want to be co-workers, then that's fine…There is so much greatness and happiness waiting for you. But you will never achieve it being offended and tied up emotionally by so many things…
>
> Elba, this is about you loving yourself. You loving your life. You finding the true beauty of you…

Rubio testified that prior to these emails, Hamilton told her about the church that she joined and attended, and Rubio was "fine" with that because Hamilton was "sharing" that with her. However, she took offense at the November emails because Hamilton was telling her that she should be religious and that she would be promotable if she were. In January, Rubio complained to Steve Manuszak, Respondent's Senior Vice President of Associate Services, and gave him these emails that she received from Hamilton and he told her that he would have Scott Bixby, Respondent's Senior Vice President, and Chester talk to Hamilton, and a few days later she learned that Hamilton was spoken to about the incident. Carrington testified that he discussed Hamilton's emails and Rubio's religious discrimination charge with her and, on occasion, with employees Aparicio and Jeff Ambruster. Ambruster testified that Rubio told him about the November emails that she received from Hamilton and then forwarded the emails to him, saying, "Can you believe this?" Aparicio testified that in about January, Rubio told her that she was going to "file a complaint" against Hamilton and she showed her the November 7 emails. Aparicio read the emails, but found them "normal" and "just a comment."

Hamilton testified that in January she was informed that Rubio had made a religious harassment complaint against her with the Respondent. She was surprised at Rubio's complaint because up to a few months earlier they were very close friends and "talked about religion all the time" throughout their friendship. She knew that Rubio and she did not share the same religious beliefs, but Rubio never told her that she didn't want to discuss religion with her. She testified further that she did not resent Rubio's complaint and "it didn't impact my perspective of her as an employee because I looked at our relationship at work and our relationship personally

as separate things." Bixby testified that he learned in January of Rubio's religious complaint against Hamilton and he and Manuszak "took action against that to make sure that whatever had occurred stopped." He believes that, within a week Chester, Hamilton's direct supervisor, met with her and told her that conversations about religion with an employee who reports to her, were inappropriate in or outside of work and that it should stop. Manuszak testified that he investigated Rubio's complaint about Hamilton and found that Hamilton's message was "inappropriate" despite the fact that in the past they were close friends. As a result, he "coached" Hamilton not to engage in those conversations with employees, but Hamilton did not receive any written discipline for this conduct. He also testified that in his conversation with Rubio about this complaint, she said that was only speaking for herself.

Rubio was discharged on March 4. Manuszak testified that the "immediate cause for her termination" was an instant message that she sent to Aparicio on February 25. He also testified that she was also discharged for harassing conduct toward Aparicio, where she misled and lied to her about her standing at the company. Aparicio began working as a part time employee for the Respondent in October 2010 (she was recommended for the job by Rubio) and later became a full time employee; Hamilton was her supervisor. At one point in the instant message, Rubio wrote, referring to Hamilton: "I want to try to see if the bitch says something racist again. Do you remember when she scolded Monica for speaking Spanish with Celina at her desk? She can't say that to you. Let's talk Spanish when she comes back several times and see if she can get pissed off and say something stupid." Aparicio responded that it could not involve her because she can't afford to be out of work. Rubio then wrote: "She's super-mad with me because it's really difficult for you with this job. She's pissed off that I recommended you without knowing…And the only reason she hasn't fired you is because she has to prove that you can't do the job and because she was scolded for the guy who quit." She also wrote: "She didn't let me train you well in the beginning and she didn't instruct me or Paul and she got mad and she said that other people have understood it without problems and because much of her anger is that I have personal issues with her but she thinks that because I helped you I screwed her over more. That's why she has been harassing you lately." Rubio ended the instant message by writing:

> The truth is that I didn't know that this was going to happen to you. I didn't provoke her. She has a lot of anger towards me and she wants to screw me over and screw you over in the process. Either way, I only recommended you for one thing and she's not accustomed and doesn't like to train people but she got really paranoid and started screwing with me and messing with me because she hired you and for other stupidity with her ego. If you don't understand what she's explaining to you, you are worth nothing. If you don't understand something, just play dumb and ask me or Paul through IM. Everything is because of her ego. Nobody can tell or comment on anything…She's also bothered that you walk round the floor and that you pass the time and chat with people when she does the same thing…

Aparicio testified that when she began working for the Respondent, she and Rubio were friends, but "we slowly were not friends anymore" because Rubio was criticizing her work and was telling her that she was going to be fired. She first told her in December that she was going to be fired and repeated that threat every other day. Because of these threats, Aparicio began looking for another job and Rubio assisted her by sending her links to websites for other jobs. Aparicio also met with Hamilton and emailed her to ask if she was satisfied with her job performance and Hamilton told her that her work was okay. She did not tell Hamilton about Rubio's statements to her until about late February. At that time, Hamilton asked her why she was not performing as well as previously and why she was not communicating as she had been. At that time, she told Hamilton that Rubio told her that Hamilton was looking for an excuse to fire

her, and she gave Hamilton the February 25 instant message. They had it translated from Spanish to English and on March 3, Hamilton forwarded it to Chester. His only comment was "unbelievable." A few minutes later, Hamilton sent an email to Chester, stating:

> During the time Elba sent this is when she sent me the IM saying that she wanted to strangle Michelle for not doing her work and that Paul felt the same way. No wonder the poor girl was scared of losing her job and stopped talking. Every move she made she was being told I wanted to fire her. I was actually encouraging her positive energy. She must have been so confused. This has been going on since December!

There was also an instant message between Rubio and Hamilton dated December 29, 2010 in which Hamilton, referring to Aparicio, states: "Some of the stuff she did before didn't get done correctly so she needs to really learn what she has already been taught and not just do stuff to get it done." Hamilton was questioned by Counsel for the General Counsel about this statement and testified, "That's not saying that I had concerns about her job performance…everyone makes mistakes." What she was trying to convey to Rubio in this IM was that Rubio was asking her to perform work that was outside the scope of her job: "She didn't do it correctly because it wasn't her job." Asked if Aparicio performed all her work correctly, she testified, "I don't think that Ms. Aparicio did everything perfectly, nor do I expect that from my staff." Hamilton also testified that she had no "input in the decision" to fire Rubio, and only learned about it a few hours before it took place. Manuszak testified that there were several reasons why Rubio was discharged. One was the "egregious" harassment of Aparicio, by trying to intimidate her to quit, by lying to her by telling her that she wasn't meeting the company's expectations. The other reason was "being manipulative and vindictive "to Hamilton by trying to catch her doing something wrong." The "vindictive" nature of her actions toward Aparicio and Hamilton constituted gross misconduct. Rubio testified that Aparicio had a lot of problems keeping up with the work in the department and would ask her the same questions repeatedly. In addition, Hamilton berated her for recommending Aparicio for the job and said that she should have known that she would have "issues" with the work. She testified further that she did not recall telling Aparicio that Hamilton was looking for a way to get her fired, and that she did not encourage her to look for jobs elsewhere. Carrington testified that he spent about a week and some follow up time training Aparicio, which was more time than usual to train a new employee. He felt that her performance seemed to be lacking compared to other past and present employees in the department and in January and February he told Hamilton that Aparicio was making mistakes, that she would repeatedly ask the same questions, and that because her work was below par the department was behind in its work.

Carrington became aware that Rubio was discharged on March 4 when he saw her walking away from her desk toward the building exit, and shortly thereafter, Bixby called him into his office. Carrington testified that Bixby said that Rubio had been discharged and that his "name had come up as being connected with hers." Bixby told me that he had played a significant role in his being reinstated after his layoff in 2009 and said, "…that I could really have a future with the company if I stopped talking to her and tried to move on and learn how to work with Merissa." He also told Carrington that he could "come in with a clean slate on Monday." Bixby testified that after Rubio was discharged on March 4, he met with employees on Hamilton's team, including Carrington and Aparicio. He told Carrington that his name was on the recent instant message between Rubio and Aparicio and that "…he was sometimes mentioned in the same context as Elba's disruption," referring to the IM between Rubio and Aparicio. Bixby also testified that he initially told him that Rubio had been discharged and that he (Carrington) had done very good work for the company and he had taken a personal interest in him including rehiring him after he was laid off as a result of a reduction in force, and that he handled that layoff in a professional manner. Since then he had received positive reports about his

performance, “And I told him that I was going to give him a little bit of advice, and it was free advice.” He told him, “I can’t tell you what to do inside of work, outside of work, how to spend your time. But when you’re at work you have an opportunity to get involved in all the positive things that we do or you can go in a different path, and that’s up to you. My advice to you is Monday, as far as I’m concerned, this is behind us. We’ll start with a fresh clean slate. And there are no implications around Rubio’s termination.”

Carrington testified that after Rubio’s discharge, he and Rubio discussed his obtaining his work computer and accessing company records and forwarding these emails to Rubio and to his personal email account. Rubio testified that she asked him if he felt comfortable transferring the emails, and he said that he did. He testified that their purpose was: “To highlight…the complaint she had made and the discrimination she felt she had endured, and to show…a timeline of the events.” He was looking to transfer emails from Hamilton to Rubio about converting her to Christianity, emails to show retaliation for her complaints, such as emails about increased workload or increased work pressure, as well as emails showing favorable treatment of Aparicio. In addition, he felt that the forwarded emails might be needed to protect himself. He was concerned about his job security after his March 4 discussion with Bixby about his connection to Rubio and he thought that emails praising his work performance would be helpful to him in case his job status was affected. Carrington and Rubio went to the Respondent’s facility at about 7 a.m., Saturday, March 5, not a regular work day for Carrington. He swiped his security card provided by the Respondent in order to gain access to the building, went into his office, took his computer home, and transferred the emails to Rubio and to his personal email account. He testified that he previewed each of the emails that he transferred on March 5 and 6 and that as far as he knows, all of the emails that he forwarded on those days were emails that Rubio had already received. He did not believe that forwarding these emails would be a problem until Monday, March 7, when he was discharged for sending these emails. On cross examination, Carrington testified that in order to gain access to the Respondent’s website, he first had to log in to his computer using his work password, and that some of these emails contained vendor names, customer names, manufactures codes, brand names, prices charged the Respondent by its vendors, rebates, and the names, addresses and other contact information for employees of the Respondent’s vendors. The number of emails that he forwarded exceeded three hundred.

Guy Babbitt, who is employed by the Respondent as Chief Solutions Architect, testified that in early March, he became aware of some “unusual activity” taking place; Carrington had forwarded in excess of three hundred emails to Rubio, as well as to his personal email account. In looking at the subject lines of the emails, he saw a number that were “questionable,” among them compensation information, bonus information and other subjects “…which I knew instinctively was definitely confidential information. I wasn’t sure why it would be leaving the company.” He reported his findings to Manuszak and sent him an Excel spread sheet listing all the emails that were sent by Carrington. When asked how this transmission compared with others that he has seen during his employment with the Respondent, he testified: “I have never seen anything like this.” Babbitt also testified that the Respondent has confidentiality agreements with some of its vendors and some of its customers, and there is information available on the Respondent’s computer system that vendors and customers would consider trade secret or proprietary information. He was asked, based upon his review of the information that Carrington sent out on March 5 and 6, was there any such information in that material. He answered: “Without a doubt.”

Bixby testified that he reviewed a large number of the emails that Carrington transferred on March 5 and 6; they included costing information, item information and specifications, a listing of the Respondent’s suppliers (vendors), and customers, as well as the volume and the

products purchased from certain vendors, and the products sold to customers together with the prices charged for these products. All of these subjects are confidential and proprietary for the Respondent, and if any of it was obtained by a competitor of the Respondent, it could result in a substantial loss of business. He looked at some of the emails and opened and reviewed the complete attachments of from ten to fifty of them. His review of these emails revealed information which might have violated the Respondent's confidentiality agreements with some of its vendors and customers. After seeing this list of emails, and reviewing some of them, he met with Manuszak and Ernie Snyder and decided that Carrington had to be discharged. The reason:

> To me, it was just very simple. It was a clear and egregious exportation of an absolutely unprecedented volume of proprietary and sensitive trade secrets to a terminated employee and also to his home email address. I could not fathom why [sic] possible business reason could justify such an act…but the other was, what was he doing that day? Was he continuing that same process and exporting thousands more email? I had no idea, so that crossed my mind, yes.

Hamilton testified that she reviewed all of the emails that Carrington transmitted on March 5 and 6, and estimates that 80 to 90% of them contained confidential and proprietary information, such as customer and vendor names, prices and product specifications; however she did not participate in the decision to discharge Carrington and only learned of it after he had been fired. Manuszak testified that when he was fully informed of the emails that Carrington transmitted on March 5 and 6, he saw just from the subject line of the emails, that they included information about their suppliers, customers, and products, and it was "the most egregious violation of a confidentiality agreement that I've seen in twenty years. " Because of that, he felt that there was no need to meet with, and speak to, Carrington before terminating him. He also testified that in his five years of employment with the Respondent, he knew of only one other incident where an employee transmitted company proprietary material outside the company. That employee was Mark Lambert, who was discharged when it was discovered that he sent confidential information, that Respondent considered proprietary, to a former employee.

As stated, *supra*, at the close of his case, Counsel for the General Counsel amended the Complaint to add two allegations: that the Respondent, by Manuszak, promulgated an overly broad rule prohibiting employees from giving personal references, and that the Respondent maintained an overly broad rule prohibiting employees from disclosing personal telephone numbers. As to the former allegation, on March 7, Rubio sent an email to ten individuals stating:

> It was a pleasure working with you over the past 3 years. I was laid off last Friday for blowing the whistle on manager abuse in January, no further reasoning was provided. I would like to request personal references from you, as I begin my job search. If you do not feel you can provide a recommendation, I understand. Thank you.

One of the individuals that this was sent to, forwarded it to Sherry Donald, who had been Rubio's supervisor at Gampac, stating only "FYI", and she forwarded it to Manuszak, stating, "Thought you should know this is going around to our associates." Manuszak then forwarded it to Babbitt, asking: "Can we block incoming emails from Elba's personal email address to any SGA associate?" Babbitt responded: "Future emails will now be blocked," and Manuszak responded, "Thanks! I'd also like to get copies of all correspondence sent from and sent to Elba's personal email address the last 90 days." Rubio testified that two of the recipients of her email, Hilda Phillips and Robin Cook, and possibly a third, Rich Clesiak, may have been supervisors; the others were rank and file employees. Three of the ten individuals responded to Rubio that they would be happy to be a personal reference for her; Manuszak testified that none

of them were disciplined for their response. Babbitt testified that Manuszak never asked him to check the incoming or outgoing emails from any of the ten individuals named in Rubio's email; they were only looking for inbound emails from Rubio.

Manuszak testified that the Respondent has a policy forbidding only supervisors and managerial employees from giving references to former employees, although it is not contained in the Employees' Handbook; it is covered in a training session. In the affidavit that he gave to the Board, on this subject he stated: "The employer has a policy that any references go through the Employer's associate services department [generally referred to as Human Resources] and the associate services department would confirm only the dates of employment to anyone who called to inquire about a former employee of the Employer." Manuszak, who has approximately twenty years experience in human resources, testified that a rule such as this prohibiting supervisory employees from giving references for former employees, on their own, is "extremely common" because information given out by company representatives can be considered libelous or slanderous. However, non-supervisory employees are not considered agents of the employer for these purposes. When he received the email that Donald forwarded to him on March 7, he wasn't totally familiar with the duties performed by all ten recipients of the Rubio's email, but he knew that one of them, Cook, was a supervisory employee. He did not speak to Cook at that time about violating the Respondent rule, because, "I had bigger matters to attend to on March 7." As regards the allegation that the Respondent has a rule prohibiting employees from disclosing employees' personal telephone numbers, he testified, "No, we don't have a policy regarding disclosure of personal cell phone numbers."

The initial allegation involves Bixby's discussion with Carrington on March 4, after Rubio was fired. It is alleged that by this conversation the Respondent violated Section 8(a)(1) of the Act, by interrogating Carrington about his concerted activities, orally promulgated an overly-broad and discriminatory rule prohibiting its employees from talking to other employees, threatened him with unspecified reprisals if he engaged in concerted activities, and created the impression among its employees that their concerted activities were under surveillance by the Respondent. Carrington testified that after Bixby told him that Rubio had been discharged and that he (Bixby) played a significant role in his reinstatement after his layoff in 2009, he said that Carrington could have a future with the company if he stopped talking to Rubio and try to move on and learn how to work with Hamilton, and that he would come in with a "clean slate" on Monday. Bixby testified that he told Carrington that his name was included in Rubio's recent instant messages to Aparicio and that he was mentioned in the "same context as Elba's disruption." He complimented him on his work and offered him "a little bit of…free advice." He said, "I can't tell you what to do inside of work, outside of work…But, when you're at work, you have an opportunity to get involved in all the positive things that we do or you can go in a different path, and that's up to you. My advice to you is Monday, as far as I'm concerned, this is behind us. We'll start with a fresh clean slate. And there are no implications around Rubio's termination." This is a difficult credibility determination because neither Carrington nor Bixby clearly lacked credibility. Although I found Carrington to be somewhat evasive in his testimony in other areas, I found Bixby's testimony about this conversation unconvincing. It sounded more like something that was prepared for trial rather than a spontaneous discussion with Carrington about his relationship with Rubio. I therefore credit Carrington's version of this conversation.

As Bixby did all the talking, and he never questioned Carrington about his concerted activities, or those of other employees including Rubio, I recommend that the allegation that Bixby interrogated Carrington (Paragraph 4(g)(1) be dismissed. As there is also no evidence to support the allegation that Bixby, in this conversation, created an impression among its employees (actually, in this situation, Carrington) that their concerted activities were under

surveillance by the Respondent, I also recommend that this allegation (Paragraph 4(g)(4)) be dismissed as well. The remaining two allegations, paragraphs 4(g)(2) and 4(g)(3), are more difficult. It could be argued that Bixby's statement that Carrington could really have a future with the company if he stopped talking to Rubio and try to move on and learn how to work with Hamilton, could be a discriminatory rule prohibiting employees from talking to other employees, as well as an implied threat to Carrington if he engaged in concerted activities. On the other hand, it could be argued that Rubio had already been discharged and was no longer an employee due to her harassment of Aparicio, as set forth in the instant message referred to above, as well as her attempt to "bait" Hamilton to make a mistake, and that Carrington, to some degree, participated in the plans set forth in this instant message, so Bixby's statement to him was not a threat or an unlawful prohibition, but was meant as a helpful suggestion on how to maintain his excellent work performance. Communications with a discharged employee can, under certain circumstances, constitute concerted activities. In *Buck Brown Contracting Co., Inc.,* 283 NLRB 488, 489 (1987), employee Kelly had been fired by the employer and fellow employee Bridges spoke to the employer and asked if he could be rehired. Bridges was fired and the Board found that Bridges' attempt to assist Kelly with procuring employment with the employer was protected concerted activity. The instant matter is distinguishable. There is no evidence that Carrington and Rubio were at that time preparing to take any lawful group action against the Respondent, nor did Bixby's statement directly address any group action. Rather, I find that the words that Bixby used were meant to convince Carrington not to repeat the unprotected conduct that they engaged in with the instant message to Aparicio, and I therefore recommend that this allegation, and paragraph 4(g) of the Complaint be dismissed in its entirety.

Paragraph 4(c) of the Complaint alleges that since about February 22 the Respondent has maintained an overly broad and discriminatory rule prohibiting employees from disclosing employee cell phone numbers although, at the hearing, Counsel for the General Counsel stated that this amendment referred to disclosing "personal telephone numbers." Manuszak testified that the Respondent does not have a policy regarding the disclosure of personal cell phone numbers. As there was no other evidence supporting this allegation, I recommend that it be dismissed.

Paragraph 4(h) alleges that on or about March 7 the Respondent, by Manuszak, promulgated an overly broad and discriminatory rule prohibiting employees from providing personal references to other employees. The sole support for this allegation is the emails that were sent by Rubio on March 7 to ten individuals employed either by the Respondent or another subsidiary of Service Group of America, Inc. Either one or two of these ten individuals was a supervisor; the rest were rank and file employees. The email stated that she was "laid off" on March 4, and "I would like to request personal references from you, as I begin my job search." This email was forwarded to Donald, who forwarded it to Manuszak stating: "Thought you should know this is going around to our associates" and Manuszak forwarded it to Babbitt, asking: "Can we block incoming mails from Elba's personal email address to SGA Associates?" Six minutes later Babbitt responded: "Future emails will now be blocked." Three of the ten individuals responded to Rubio that they would be happy to be a personal reference for her and these employees were not disciplined. Manuszak's uncontradicted testimony establishes that Respondent did not have a policy forbidding employees from providing references to other employees; only supervisors were prohibited from giving references, and Manuszak's explanation for the rule was certainly a reasonable one. The only evidence supporting a rule prohibiting employees from giving personal references is the fact that the Respondent blocked her incoming emails after it became aware of her March 7 emails. However, that could also be explained by the fact that she had been fired, that Carrington had transferred over three hundred emails to her, and they could see no valid reason for her to communicate with the

employees. More importantly, there was no testimony that any employee was aware of any such restriction, and none of the employees who agreed to give a reference to Rubio were disciplined. I therefore recommend that this allegation (Paragraph 4(h)) be dismissed.

The final allegations are that the discharges of Rubio on March 4, and Carrington on March 7 violate Section 8(a)(1) of the Act. The Complaint alleges that they were discharged because they engaged in, or because the Respondent believed that they engaged in, protected concerted activities by discussing with each other and complaining to the Respondent about Respondent's national origin and religious discrimination against its employees, favoritism of certain employees, insufficient training of employees and by sending and forwarding emails to each other concerning the wages, hours and working conditions of the Respondent's employees.[2] As regards credibility, as between Aparicio, Carrington, Rubio and Hamilton, I found Aparicio clearly the most credible. Although she was still employed by the Respondent, and had been harassed at work by Rubio, it appeared to me that she was attempting to testify in an open and truthful manner. In addition, her testimony was supported by the February instant message. On the other hand, I found Rubio to be the least credible of the group whose testimony was often evasive on cross examination. Hamilton and Carrington were, at times, evasive in their testimony, but, at times were also fairly credible. Under *Wright Line,* 251 NLRB 1083, 1089 (1980), in Section 8(a)(3) cases or violations of Section 8(a)(1) turning on employer motivation, the General Counsel must first make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. If that is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. I find that Counsel for the General Counsel has not satisfied his initial burden herein. The only credible evidence concerning possible concerted activities herein is Rubio's complaint to the Respondent about Hamilton's inappropriate November email regarding their disparate religious beliefs. One can certainly understand Rubio's discomfort upon receiving this email, but the undisputed evidence establishes that Hamilton was spoken to about it shortly after Rubio reported it, and was told that it was not appropriate either at work or outside of work to communicate with employees in that manner, and no similar emails followed. In addition, there is no credible evidence that the Respondent harbored animus toward Rubio as a result of her complaint about the religious email and there is no evidence of any connection between the complaint that she made and her discharge two months later. Rather, the evidence establishes that the February 25 instant message between Rubio and Aparicio resulted in her discharge a week later. I therefore recommend that this allegation be dismissed.

The final allegation relates to Carrington's discharge on Monday, March 7. The Complaint alleges that he was fired because he and Rubio engaged in protected concerted activities, and because he violated Respondent's Confidentiality and Non-Disclosure Rules. Carrington and Rubio discussed this transfer of emails after Rubio was fired and he told her that he felt comfortable doing so. He testified that he did it to "highlight" Rubio's complaint about the discrimination that she had endured and to show "a timeline of the events," and that he attempted to transfer emails regarding Hamilton's attempt to convert her to Christianity, as well

[2] Because I found that these allegations are clearly without merit, there are a number of issues that need not be discussed herein: whether Hamilton improperly revealed the results of Ambruster's drug test to Rubio and Carrington; whether Rubio went into the Respondent's facility on March 5 with Carrington; whether Rubio got mad and slammed a chair and a keyboard at work, as testified to by Bixby; whether Carrington "signed" a Confidentiality Agreement for the Respondent electronically; and whether Carrington complied with the Respondent's subpoena to provide all the the emails that he sent on March 5 and 6; he didn't.

as emails relating to increased work pressure or favoritism toward Aparicio. In addition, after his March 4 conversation with Bixby, he was concerned about his job security and attempted to transfer emails that praised his work performance. If this was his true purpose, he certainly accomplished it in the wrong way. Since he obtained his computer early Saturday morning, he probably had two days to collect the relevant and appropriate emails before the Respondent became aware of it and, possibly, cut off his email access. If he had done so, and had only forwarded emails relating to Rubio's and his work performance and work related issues, Counsel for the General Counsel could then reasonably argue that he was engaged in protected concerted activities. However, instead of accessing and copying appropriate emails relating to their work and their complaints, he indiscriminately copied emails related to the operation of the company's business, having no relation to their terms and conditions of employment. This accessed information included the names of vendors and customers, prices charged by its vendors, the products sold to its customers together with the prices for these products, the manufactures codes and brand names, as well as other information. By whatever name, whether proprietary or confidential, this is information that any company would not want out of its possession. More importantly, in this situation, accessing this information does not constitute protected concerted activities. I therefore find that Counsel for the General Counsel has not sustained his initial burden under *Wright Line, supra*, and recommend that this allegation be dismissed.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The provisions relating to Compensation and Confidentiality contained in the Respondent's Handbook and the restriction on discussing payroll or employee information about other employees, as contained in Respondent's Confidentiality and Non-Disclosure Agreement, could chill employees in the exercise of their Section 7 rights, and therefore violate Section 8(1)(1) of the Act.

3. The Respondent did not further violate the Act as alleged in the Amended Complaint.

The Remedy

Having found that the Compensation provision contained in its Employee Handbook, and the restriction on discussing payroll or employee information regarding other employees violate the Act, I recommend that the Respondent be ordered to rescind these provisions and to notify all of its employees electronically that these provisions has been rescinded from the Employee Handbook and the Confidentiality and Non-Disclosure Agreement. Respondent is also ordered to post the Board notice at the facility involved herein.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Food Services of America, Inc., a subsidiary of Services Group of America, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Enforcing the Compensation provision contained in its Employee Handbook, as further explained by the Confidentiality provision contained therein.

(b) Enforcing the restriction on discussing payroll or employee information regarding other employees as set forth in the Confidentiality and Non-Disclosure Agreement.

(c) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all of its employees electronically that these provisions will no longer be enforced.

(b) Within 14 days after service by the Region, post at its facility in Scottsdale, Arizona, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining allegations contained in the Amended Complaint be dismissed.

Dated, Washington, D.C. March 27, 2012

Joel P. Biblowitz
Administrative Law Judge

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT enforce the Compensation and Confidentiality provision contained in our Employee Handbook, **WE WILL NOT** enforce the restriction on discussing payroll and employee information regarding other employees as contained in our Confidentiality and Non-Disclosure Agreement, and **WE WILL NOT** prohibit you from discussing your wages or terms and conditions of employment with others.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights as guaranteed you by Section 7 of the Act.

WE WILL rescind the Compensation and Confidentiality provisions contained in our Employee Handbook and the restriction on discussing payroll or employee information regarding other employees as contained in our Confidentiality and Non-Disclosure Agreement and will notify all of our employees electronically that we have done so.

FOOD SERVICES OF AMERICA, INC.,
a subsidiary of SERVICES GROUP OF AMERICA,

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.